IN THE

Supreme Court of the United States

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vs.
THE UNITED STATES AND UTE INDIANS. } No. 605.

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STATEMENT OF CASE

The claim of Malinda Thurston, administratrix of the estate of William Cameron, deceased, against the United States and Ute Indians, arises under Section 2 of the Act of Congress of March 3, 1891, known as the Indian Depredation Act.

This claim recalls one of the most tragic events which occurred in the Western country during the frontier days. It was in 1857 and large trains of hardy emigrants with their wives and children were crossing the plains to find a home. In the summer of that year one of these wagon trains was passing through Utah on its way to California. The train was a large one and was considered the richest which had ever crossed the plains. Its value was variously estimated from $75,000 to $100,000. There were 28 or 29 emigrant wagons, with some 30 mules and horses and from 600 to 900 cattle. The party consisted of men, women, and children and numbered nearly 150 souls.

William Cameron, his family, and married daughter, Malinda Thurston, were members of this wagon train.

The train arrived at Salt Lake City, Utah, in August, 1857. The Mormon power was then at its height and had even hurled defiance at the Federal Government. Owing to the enmity of the Mormons, the emigrants met with many rebuffs and this made them the more anxious to reach California.

At Salt Lake City the train divided. Malinda Thurston, who was then the wife of Henry Scott, with her husband and some of the other emigrants in 3 or 4 wagons, took the Northern route. The Northern route was the customary route to California for emigrant trains.

The larger portion of the train, consisting of some 25 or more wagons, took the Southern route, as it was represented that better pasture could be obtained for their horses and stock. William Cameron, his wife and their children, went with the larger portion of the train. William Cameron owned two wagons, with their equipment and a considerable number of horses and stock of the value of $9,500.

The large wagon train left Salt Lake City in August, 1857, and continued its journey. The Mormons were threatening, but the members of the train feared no danger as they were watchful and well armed. In the early part of September, 1857, they reached Mountain Meadows, Utah, which is near the boundary line of Nevada. A desert was before them and as the pasture at Mountain Meadows was good and the water plentiful, the train encamped to rest their stock.

Early one morning a volley was fired into the camp and seven of the emigrants fell at the first fire. The yells of Indians were heard from all sides. The emigrants were men inured to hardships and sudden alarms. They

stood to their arms and poured a well directed fire into their unseen foes. The attack continued for several days and all the stock and horses of the emigrants were killed or driven away. The attacking party consisted of about 200 Ute Indians led by 2 or 3 Mormons disguised as Indians. The emigrants constructed an earthen breastwork around their camp and drew up the wagons in a circular corral. One writer has well said that this party of emigrants was a match for all the Indians who could have been gathered from 250 miles around.

The attack of the Indians on this train had been planned by the Mormons. They thought that these Indians would make short work of the train and rich booty secured. Finding that the attack had failed, the Mormons summoned their regular militia. They gathered some 50 men, all of them white men, of the same race and people as the emigrants. Even this addition to the strength of the besiegers was not sufficient to induce them to attack the now well fortified camp. These emigrants could only be taken by guile.

One of the Mormons washed the paint off his face and approached the train with a white flag in his hand. One of the emigrants advanced to meet him. The Mormon explained that a company of Mormon militia was at hand and that they would protect the emigrants from the Indians. After some parley it was arranged that the emigrants should lay down their arms and the Mormon militia should accompany them back to the settlements. With this understanding the emigrants surrendered and marched out of their camp. The women and children were in front and the men marched behind them with a Mormon militiaman at each man's side. A signal was given, the Mormon militia shot down the unarmed emigrants, the Indians rushed in upon the women and children and murdered

and ravished and tortured them to death. It was estimated that 120 persons were massacred and there were spared only some 15 children, who were too young to remember the terrible events through which they had passed.

The news of this terrible event was slow in reaching the settlements. The Mormons and Indians for a time guarded their secret well. Eventually, however, the facts of the massacre became known. A storm of wrath and indignation swept over the country. Debates in Congress published the facts and special investigations of the affair were made by the War Department and the civil authorities. Only one of the perpetrators of this foul outrage was ever brought to justice. John D. Lee was the man who planned the attack, who led the Indians with his face painted, who advanced to the emigrant train with a white flag. He was a bishop in the Mormon church and the leader of the expedition. A number of years afterwards John D. Lee was formally tried and executed as a murderer for his participation in this massacre.

All of the property of the emigrants was taken by the Indians and Mormons. Even the bodies of the slain were stripped of their clothing and jewels and left naked and unburied as a prey to the wild beasts. The Court of Claims found that property valued at $9,500 belonging to William Cameron was taken at this time.

Mountain Meadows had been a green and fruitful spot, but after the massacre it was shunned by man and beast alike and became barren and desolate.

The massacre at Mountain Meadows is a well known historical fact and its details are given in numerous histories of the West.

Bills for the relief of Malinda Thurston, as daughter and next of kin of William Cameron, were introduced in

Congress on November 12, 1877 and March 18, 1878. Affidavits setting out in full the details of the massacre and the fact that it occurred at Mountain Meadows, Utah, together with the amount and value of the property taken were filed with these bills.

The bills and affidavits filed in Congress did not name Indians as participators in the massacre. Section 2 of the Indian Depredation Act of March 3, 1891, provides that a claim for a depredation which occurred prior to July 1, 1865, must have been pending in Congress or in the Interior Department on March 3, 1891. The Court of Claims decided that this claim was not pending in Congress within the meaning of the Indian Depredation Act, and dismissed the case on this ground.

ASSIGNMENT OF ERRORS

1. The Court of Claims erred in holding that the claim of Malinda Thurston was not pending, within the meaning of the Indian Depredation Act, prior to March 3, 1891.
2. The Court of Claims erred in holding that they had no jurisdiction to consider the claim of Malinda Thurston.
3. The Court of Claims erred in not rendering judgment in favor of Malinda Thurston in the sum of $9,500.

BRIEF

The claim of Malinda Thurston was filed in the Court of Claims under the Indian Depredation Act of March 3, 1891 (26 Stat. at L., p. 85). Section 2 of this Act provides:

> "That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the Court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government; *Provided*, That no claim

> accruing prior to July first, eighteen hundred and sixty-five, shall be considered by the Court unless the claim shall be allowed or has been or is pending, prior to the passage of this Act, before the Secretary of the Interior or the Congress of the United States, or before any superintendent, agent, sub-agent, or commissioner, authorized under any act of Congress to enquire into such claims; but no case shall be considered pending unless evidence has been presented therein."

The Court of Claims found that the claim of Malinda Thurston was for an Indian Depredation within the meaning of the Act of March 3, 1891. (P. 13, Finding VIII.)

The Court of Claims found that property of claimant's intestate, William Cameron, valued at $9,500, was taken or destroyed by the Ute Indians and Mormons at the time alleged in the petition, September, 1857, and in the manner set out. (P. 5, Finding VI.)

The Court of Claims found that a claim for the loss alleged in this petition was filed before the Congress of the United States with evidence in support thereof on November 12, 1877, and March 18, 1878. (P. 5, Finding VII.)

The claim of Malinda Thurston filed in Congress, and the claim of Malinda Thurston filed in the Court of Claims, are identical except that the claim filed in Congress failed to name the Ute Indians as co-defendants with the Mormons.

The Court of Claims dismissed the petition because the claim arose prior to July 1, 1865, and the Ute Indians had not been made co-defendants in the claim filed in Congress. The Court of Claims held that, upon these facts, there had not been a technical filing of this claim before Congress within the meaning of the Indian Depredation Act.

The Court of Claims decided ***in favor of the appellant upon the merits*** of the claim. There is no question

of laches or want of evidence. The only, question is a *highly technical one* under the Statute and involves the decision of whether the claim was properly filed in Congress in 1877.

The three assignments of error cover but one principle of law and this brief is directed to this sole question of the jurisdiction of the Court of Claims under the Indian Depredation Act.

WORDS OF STATUTE

In the first place it is necessary to consider the wording of the Statute under which this claim is filed. Counsel for the appellant contend that the filing of this claim in Congress, with evidence, even though Indians were not mentioned, is sufficient under the Indian Depredation Act.

THE INDIAN DEPREDATION ACT DOES NOT REQUIRE THAT THE WORD "INDIAN" SHOULD HAVE BEEN USED IN THE PETITION WHICH WAS FILED IN CONGRESS.

It will be noted that no claim arising prior to July 1, 1865, shall be considered by the Court of Claims unless the *claim has been pending* before the Congress of the United States. It is a well settled principle of law that the words of an act can be explained where their meaning is not plain. It is equally well established that where the words of a law are clear, there can be no construction which will alter the plain meaning of the words themselves.

> "Our duty is to read the Statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation. *Waller vs Harris,* 20 Wend. (N. Y.) 561; *Pott vs Arthur,* 104 U. S. 735. When the language is plain, we have no right to insert words and phrases so as

to incorporate in the Statute a new and distinct provision."

United States vs Temple, 105 U. S. 97, 99.

"We can only here say, as we did in the case of *French* v. *Spencer,* (21 How., 238,) that the Act of 1826 is plain on its face and single in its purpose; and that in such cases the rule is, that where the Legislature makes a plain provision, without making any exception, the Courts of justice can make none, as it would be legislating to do so."

Maxwell v. *Moore,* 22 How. 185, 191.

"Where the meaning of a Statute is plain it is the duty of the Courts to enforce it according to its obvious terms. In such a case there is no necessity for construction."

Thornley v. *United States,* 113 U. S. 310, 313.

In this Indian Depredation Act Congress has stated that there must have been a *claim pending.* Congress did *not* say that there must have been a claim pending *against the Indians,* nor did it say that the tribe of *Indians should be named,* nor did it say that the *word Indian should appear.*

If Congress had intended to say that no claim which arose prior to July 1, 1865, was to be considered by the Court of Claims unless the claim had been pending *against the Indians,* prior to the passage of that Act, it must have been presumed that Congress would have said so. Congress did not say anything of this kind. Hence it must be presumed that Congress did not intend to limit the class of claims which were pending before it.

It is well to note in the act that Congress has used the word "Indian" a number of times. In the title of the Act we find the word "Indian." In the body of the Act the words "Indian" or "Indians" occur twenty times. If

Congress had intended to limit the claims accruing prior to July 1, 1865, to those which had been filed against "Indians," this word would have been inserted in the sentence. No such word appears in this sentence.

Where there is no ambiguity there can be no construction. To insert words in an Act, the meaning of which is plain, is not within the province of a Court. This is a legislative and not a judicial function. Courts must execute the laws as passed by Congress and must not attempt to amplify or explain a sentence which is plain in itself.

DEFINITION

It is very important at the outset to bear clearly in mind the definition of the words "claim pending."

In the first sentence of Section 2, the word "claims" is used. This sentence is followed by a clause referring to "no claim." In the proviso the expression "no claims" occurs. In the saving clause following the proviso we find this word used twice. In the concluding sentence of this paragraph relating to this subject matter we find the word "case" used.

It is evident that in each of these sentences in which the word "claim" appears, reference is intended to a claim for a depredation committed by Indians. The Act itself is an Indian Depredation Act. It deals with claims arising from Indian Depredations. The purpose and spirit of the law refers specifically to this class of cases. It would be absurd to argue that the word "claims" as used in the first sentence of this section was general and referred to all claims. In this event all Statutes of Limitations imposed by the Government would have been waived. Such was not the intention of Congress and the word "claim" undoubtedly refers to such as arose out of Indian depredations.

THE DEFINITION OF THE TERM "CLAIM PENDING" IS A CLAIM FOR A DEPREDATION COMMITTED BY INDIANS WHICH WAS PENDING AT THE TIME OF THE PASSAGE OF THE ACT.

The law does not state that a claim must be pending *against the Indians.* Congress intended by these words to define the character of the claim, *i. e., a claim for a depredation committed by Indians.* Congress did not intend to raise up a rule of pleading as a technical barrier to the presentation of a claim.

The term "claim pending" is plainly used in the Indian Depredation Act as a definition of the "character" of the claim. It is simply a phrase descriptive of a certain class of cases, and was not intended as a technical rule of pleading.

The claim of Malinda Thurston undoubtedly falls within this definition. This claim is one which arose out of a depredation committed by Indians. It is an Indian depredation claim. The mere fact that it was not filed in Congress formally against the Indians in no way detracts from its character. Its character cannot be changed by a defect in the manner of its filing. The imperfect manner in which this claim was presented to Congress originally is waived by the Statute. Hence the claim of Malinda Thurston was properly filed in the Court of Claims as an Indian Depredation claim.

A case directly in point is that of *Johnson* v. *The United States,* 160 U. S., 546. This was a case arising under the Indian Depredation Act and came up on appeal to this Court from the Court of Claims. The question involved related to the citizenship of the claimant. At the date of the depredation the claimant had taken out his first naturalization papers, but did not take out his final papers until after the depredation had occurred. The Court of Claims construed the Indian Depredation Act to refer

only to the claims of those who were citizens at the date of the depredation. In affirming the judgment of the Court of Claims, this Court held on page 549:

> "By the first clause jurisdiction is given of 'claims for property of citizens of the United States taken or destroyed.' But claimant had no such claim. It is for property of an alien, taken and destroyed. True, he is now a citizen, and was at the time of the passage of the act. But the language is not 'claims of citizens for property,' which might include his case. *The definition is of the character of the claim* and not of the status of the claimant; if the property was not when taken or destroyed the property of a citizen, a claim therefor was at that time clearly outside the statute; and while the status of the claimant may have changed, the nature of the claim has not."

In accordance with the reasoning of the Court in this case, we contend that the term "claim pending" is simply a designation of a particular class of cases. It was not intended by this Indian Depredation Act to change the nature of an Indian depredation claim. This term is simply a definition of the nature and character of the claims embraced and was not intended to be considered as a strict and technical rule of pleading.

A consideration of the other clauses of the Act shows that this definition of "claim pending" is in accordance with the spirit and purpose of the law. Throughout the entire Act, the purpose of Congress is shown to be that of the utmost liberality in the manner of presenting claims. A claim must necessarily be one for a depredation committed by Indians. But if a claim of this character is presented in an informal manner, this defect is expressly waived by the Statute. No technicalities are permitted to stand in the way of a just claim.

In the first sentence of section 2 of the Act, it is provided that "all questions of limitations as to time and manner of presenting claims are hereby waived." If all questions relating to the *manner of presenting claims* are waived by Congress, how can the Court of Claims hold that the claimant in this case was negligent in the manner of presenting her claim. Congress has expressly waived all technical barriers relative to the manner of presenting claims.

In section 3 there is found a full description of the manner and form for the petition in the Court of Claims. Even here, however, Congress did not intend that the Court should be bound by strict and technical rules of pleading. The claimant was allowed full liberty in charging the defendant Indians and was only required to name "the tribe or tribes, the band or bands of Indians by whom the illegal acts were committed, *as near as may be.*"

In section 5, the Court of Claims is directed to determine, "if possible, the tribe of Indians or other persons by whom the wrong was committed." It was not intended by Congress that compensation should be granted only when the tribe of Indians committing the depredation could be identified. In the concluding portion of this same sentence, the Court of Claims was directed to render judgment against the tribe of Indians committing the wrong, "when such tribe can be identified." Where the tribe of Indians could not be identified the Court was directed to render judgment against the United States and unknown Indians.

These references to the various parts of the Indian Depredation Act make it clear that Congress intended to allow great liberality in dealing with technical questions. All questions of the manner of filing claims were waived. It was not necessary to name the proper tribe of Indians.

It was intended that the Court of Claims should render judgment against the United States alone, if the tribe of Indians could not be identified. Such has been the practice in the Court of Claims under this Act and judgments have been frequently rendered against the United States and unknown Indians where it has been impossible, from the evidence, to determine the tribe of Indians committing the wrong. *United States* v. *Gorham*, 165 U. S., 316.

The Court of Claims has fallen into the error of confounding rules of pleading with the substance of the case. It is the old story of the form and the matter being so closely connected as to deceive. The claim of Malinda Thurston arose out of an Indian depredation. There is no question but what the Indians committed the outrage and took the property and the Court of Claims has so held. This is the substance and marrow of the claim, even though the Indians were not formally named as defendants in the petition in Congress. All matters of form relative to the manner of filing these claims have been expressly waived by Congress and a reading of the Act plainly shows that Congress intended to deal with the utmost liberality towards just claims. Malinda Thurston's intestate lost property at the hands of the Indians. Malinda Thurston presented a defective petition to Congress. Congress waived all matters of form in connection with this presentation. Malinda Thurston is now entitled to recover.

AUTHORITIES ON CONSTRUCTION

A review of a few of the leading authorities on the construction of Statutes will serve to emphasize the contention of the appellant.

One of the earliest cases on the question of the construction of a Statute upon the point in issue is that of the *United States* v. *Fisher*, 2 Cranch, 358. One of the

questions involved was the priority of the United States over private creditors out of the estate of a bankrupt. The Government contended that this priority was given under the 5th section of an Act entitled "An Act to Provide more effectually for the Settlement of Accounts between the United States and Receivers of Public Money." (1 Stat. at Large, 512.)

On the other hand it was urged that while the wording of this 5th section of the Act might be construed to give the United States this preference, still the purpose and spirit of the law was to deal with certain defaulting officials of the United States and to give preference to the United States only where receivers of public money were concerned.

The case came up on error from the Circuit Court of the District of Pennsylvania and the decision of this Court was rendered by Chief Justice Marshall at page 385.

> "That these words, taken in their natural and usual sense, would embrace the case before the Court, seems not to be controverted. 'Any revenue officer, or other person, hereafter becoming indebted to the United States by bond or otherwise,' is a description of persons, which if neither explained nor restricted by other words or circumstances, would comprehend every debtor of the public, however his debt might have been contracted.
>
> "But other parts of the Act involve this question in much embarrassment. . It is undoubtedly a well established principle in the exposition of Statutes, that every part is to be considered, and the intention of the legislature extracted from the whole. It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.
>
> "On the abstract principles which govern courts in construing legislative acts, no difference of opinion

can exist. It is only in the application of those principles that the difference discovers itself.

"*As the enacting clause in this case would plainly give* the United States the preference they claim, *it is incumbent on those who oppose that preference, to show an intent varying from that which the words import.* In doing this, the whole act has been critically examined; and it has been contended with great ingenuity that every part of it demonstrates the legislative mind to have been directed towards a class of debtors, entirely different from those who become so by drawing or endorsing bills, in the ordinary course of business.

"The first part which has been resorted to is the title. On the influence which the title ought to have in construing the enacting clauses, much has been said, and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends, that the title of an act can control plain words in the body of the Statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. *Where the intent is plain, nothing is left to construction.* Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case, the title claims a degree of notice, and will have its due share of consideration.

"The title of the act is unquestionably limited to 'receivers of public money;' a term which, undoubtedly, excludes the defendants in the present case.

"The counsel for the defendants have also completely succeeded in demonstrating, that the first four sections of this act relate only to particular classes of debtors, among whom the drawer and indorser of a protested bill of exchange would not be comprehended. Wherever general words have been used in these sections, they are restrained by the subject to which they relate, and by other words frequently in the same sentence, to particular objects, so as to make it apparent that they were employed by the

legislature in a limited sense. Hence it has been argued, with great strength of reasoning, that the same restricted interpretation ought to be given to the fifth section likewise.

* * * * *

(p. 389) "But the fifth section is totally unconnected with those which precede it. Regulations of a suit in court no longer employ the mind of the legislature. The preference of the United States to other creditors becomes the subject of legislation; and as this subject is unconnected with that which had been disposed of in the foregoing sections, so is the language employed upon it, without reference to that which had been previously used. *If this language was ambiguous, all the means recommended by the counsel for the defendants would be resorted to in order to remove the ambiguity. But it appears, to the majority of the court, to be too explicit to require the application of those principles which are useful in doubtful cases.*

"The mischiefs to result from the construction on which the United States insist, have been stated as strong motives for over-ruling that construction. That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted; but it is also true that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects. But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it should be going a great way to say that a con-

> strained interpretation must be put upon them, to avoid an inconvenience which ought to have been contemplated in the legislature, when the act was passed, and which in their opinion, was probably overbalanced by the particular advantages it was calculated to produce."
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> *United States* v. *Fisher*, 2 Cranch, 358.

The broad principle expressed in this case is that a court must determine the meaning of the law from the words of that law. There can be no construction where there is no ambiguity. This is peculiarly applicable to the present case. We have a clause in an act which leaves out the word "Indian" and refers simply to a "claim pending." The Government contends that the word "Indian" must be inserted before the term "claim pending." In the words of Chief Justice Marshall, if this language of the act were ambiguous, all of the rules of construction would be resorted to in order to remove the ambiguity. In the present case, there is no ambiguity and no construction is proper.

In this *Fisher* case, it was contended, just as it has been in the present case, that the title to an act showed plainly that the intent of Congress was limited to a special class of cases. It was contended that the preference of the United States was limited to cases involving revenue officers or other receivers of public money, as the title and preceding sections of the act referred to this class of cases. In the present case it has been contended that the title to the act refers to "Claims arising from Indian Depredations" and that hence, no other claims under the act are to be considered except claims which have been specifically filed against the Indians.

In the *Fisher* case the court held that when the words of an act infringe private rights, or overthrow funda-

mental principles, or depart from the general system of the laws, "the legislative intention must be expressed with irresistible clearness, to induce a court of Justice to suppose a design to effect such objects." None of these exceptions apply to the present case. No public or private right is infringed because the claim of Malinda Thurston is included in the Indian Depredation Act. There is no fundamental principle overthrown because the claim of Malinda Thurston is included in the Indian Depredation Act. The general system of law is not departed from because the claim of Malinda Thurston is included in the Indian Depredation Act.

The wording of this section of the Indian Depredation Act is plain and includes the claim of Malinda Thurston. A survey of the entire act strengthens this contention and shows that Congress intended to waive technical objections and to include all just claims.

This *Fisher Case* is cited in *White* v. *United States,* 191 U. S., 545, 550, and in nearly all of the leading cases on the subject of statutory construction.

The case of *Sturges* v. *Crowninshield,* 4 Wheaton, 122, 202, involved the construction of the Constitution of the United States with reference to the bankruptcy laws. The State of New York had passed a bankrupt law and it was contended that this was in violation of the Constitution of the United States. Chief Justice Marshall delivered the opinion of the Court in this case.

> "Before discussing this argument, it may not be improper to premise that although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the *spirit is to be collected chiefly from its words.* It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words in an

> instrument expressly provide shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

In the present case we contend that the meaning and spirit of the Indian Depredation Act is to be collected from its words. The words in this section of the Act include the claim of Malinda Thurston. In the language of Chief Justice Marshall it would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words in an instrument expressly provided shall be exempted from its operation.

There is no conflict between the wording of the several sections of this Statute. There is no inconsistency which would necessitate the exclusion of the claim of Malinda Thurston. Malinda Thurston lost property at the hands of the Indians and this is as much an Indian depredation claim as any other filed under this Act.

There is no attempt on the part of the claimant to depart from the language and common import of the words. The claimant insists that the wording of this section of the act be taken in its natural and common meaning. The words "claim pending" include that of Malinda Thurston. It is a strained and forced construction which would insert the word "Indian" before the expression "claim pending."

The burden of proof is upon the Government to show that such a construction is necessary. There is nothing in the Act which would justify such a construction.

In Potter's edition of Dwarris on Statutory Construction, page 199, occurs a paragraph which is of importance in connection with the general principle of law which we are now taking up.

> "*Words cannot be inserted;* 'Every day,' said Patterson, Jr., in a late case, 'I see the necessity of not importing into statutes, words which are not to be found there. Such a mode of interpretation only gives occasion to endless difficulties.' In Lamond v. Eiffe (3 Q. B. Rep. 910) Lord Denham said, 'We are required to add some arbitrary words to the section, which would exclude us from acting in certain cases. We cannot introduce any such qualifications, and I cannot help thinking that the introduction of qualifying words in the interpretation of statutes is frequently a great reproach to the law. None of the distinctions suggested are contained in the plain words of the act; and we cannot qualify them by any arbitrary introductions.' So, in Everret and Mills (4 Scott, N. C., 531), Tildall, C. J. said, 'It is the duty of all courts to confine themselves to the words of the legislature; *nothing adding thereto, nothing diminishing.* We must not import into an act a condition or qualification which we do not find there.'"

In the present case, under the contention of the Government, the Court is required to add an arbitrary word to section 2 of the act so that the section will read "a claim pending against the Indians." Such addition of an arbitrary word is expressly prohibited by this authority. The words of the act are plain and the Court should neither add anything thereto, nor diminish the application thereof by the introduction of a word which was not included in

the original Act. The qualifying word "Indian" is not found in the Act and should not be imported into it.

In 2 Lewis' Sutherland Statutory Construction (2d edition) section 367, is found the following:

> "When the intention of the legislature is so apparent from the face of a Statute that there can be no question as to its meaning, there is no room for construction. It is not allowable to interpret what has no need of interpretation. To attempt to do so would be to exercise legislative functions. There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses. These views of eminent courts are supported by numerous cases."

In the present case the intention of Congress as expressed in the Act is apparent upon its face. It is not allowable to interpret what has no need of interpretation. When the language is clear and unambiguous, as in the present case, it must be held to mean what it plainly expresses. That Act on its face embraces all claims for Indian depredation, without qualification, and it should not be interpreted to exclude a claim which is included on its face.

There is no other section in the Act which cuts down or explains the meaning of this clause of section 2. The clause itself is not repugnant to the purview of the Statute. The Act must be read literally so as to include all claims embraced by this clause. The Government is unable to show that any qualification was intended by Congress.

In the case of *Lewis, Trustee* v. *United States*, 92 U. S., 618, this Court had under consideration the bankruptcy

law of March 2, 1867. On page 621 of the opinion the Court held:

> "Where the language of the Statute is transparent, and its meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe. *United States* v. *Wiltberger,* 5 Wheat. 95, *Cherokee Tobacco, 11 Wall.,* 621."
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> "That the facts disclosed in the record bring the case within the plain terms and meaning of the section in question, seems to us, viewing the subject from our standpoint, almost too clear to admit of serious discussion. Affirmative discussion, under such circumstances, is not unlike argument in support of a self evident truth. The logic may mislead or confuse. It cannot strengthen the pre-existing conviction. 11 Wall., 621."

In the present case there can be no ground for argument upon the meaning of the words "claim pending" in this section. The words themselves are sufficiently broad to cover all claims, and include the claim of Malinda Thurston. There is no need for affirmative discussion on this subject and the Government admits our contention by endeavoring to insert other words in the Statute which qualify the terms used. The words are plain and their meaning obvious. There is no room for the office of construction.

In the case of the *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S., 1, this Court had under consideration a clause in Section 4887, U. S. R. S., relating to patents. In this case the plain terms of the Statute were attempted to be changed by a regulation of the Patent Office. The opinion

of the Court was rendered by Mr. Justice Harlan and on page 36 it was held:

> "In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden* v. *Collector*, 5 Wall., 107, 111, 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of Statutes.' 'Where the language of the act is explicit' this court has said, 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. * * * It is not for the court to say, where the language of a Statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' *Scott* v. *Reid*, 10 Pet. 524, 527."

One of the leading cases on the question of statutory construction as herein set out, is that of *Brewer's Lessee* v. *Blougher*, 14 Pet., 178. In this case the Court considered the construction of an act of the Assembly of Maryland, passed in 1825 entitled "An Act relating to Illegitimate Children." It was contended that these words "Illegitimate Children," should receive a narrower interpretation than the literal meaning of the act would indicate. The Supreme Court held however, speaking through Chief Justice Taney, at page 198:

> "It is undoubtedly the duty of the Court to ascertain the meaning of the legislature, from the words

used in the Statute, and the subject matter to which it relates, and to restrain its operation within narrower limits than its words import, if the Court is satisfied that the literal meaning of its language would extend to cases, which the legislature never designed to embrace in it.

"In the case before us the *words are general, and include all persons* who come within the description of illegitimate children. According to the principles of the common law, an illegitimate child is *filius nullius,* and can have no father known to the law. And when the *legislature speaks in general terms,* of children of that description, *without making any exceptions, we are bound to suppose they design to include the whole class.*"

Cited in *Market Co.* v. *Hoffman,* 101 U. S., 116.
Petri v. *Commercial Bank,* 142 U. S., 650.
McKee v. *United States,* 164 U. S., 23.

In the case just cited, the words used were in general terms and included all persons of that class. In the Indian Depredation Act, the words used are also general and on their face include all claims for depredations committed by Indians. When Congress speaks in general terms, without making any exceptions, the Courts are bound to suppose that they designed to include the whole class. The Courts will not interpolate an exception in the Statute when none exists on its face.

In the case of *United States* v. *Goldenberg,* 168 U. S., 95, this Court had before it a question certified by the Circuit Court of Appeals of the Second Circuit. The question related to the time within which payment should be made in the case of certain goods imported into the United States. Mr. Justice Brewer speaking for the Court stated at page 102:

"There are two separate classes each prescribing a condition. One is 'shall within ten days after "but

not before," * * * give notice,' etc., and the other 'shall pay the full amount of the duties,' etc. In the latter no time is mentioned and, the clauses being independent, there is no grammatical warrant for taking the specification of time from the one to incorporate it in the other.

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The Courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the Statute is not deemed controlling, *but the cases are few and exceptional,* and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the Statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense; *Holy Trinity Church* v. *United States,* 143 U. S., 457; it involves no injustice, oppression or absurdity, *United States* v. *Kirby, 7* Wall., 482; *McKee* v. *United States,* 164 U. S., 287; there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other. * * * Certainly, there is nothing which imperatively requires the Court to supply an omission in the Statute, or to hold that Congress must have intended to do that which it has failed to do."

Congress is presumed to know the meaning of words and the rules of grammar. When Congress used the term "claim pending" Congress meant what it said. Congress did not mean that a claim had to be pending against the Indians. It is sufficient, within the law, if the claim is

one for a depredation committed by Indians and was pending at the time of the passage of the act on March 3, 1891.

In the present case there are no cogent reasons for believing that Congress did not intend to include the Thurston claim within the term "claim pending." The words of the Statute are sufficiently broad, and there is nothing which imperatively requires the Court to supply the word "Indian" in this phrase.

The inclusion of the Thurston claim in the Indian Depredation Act does not offend the *moral sense.* Such inclusion does not involve *injustice, oppression, or absurdity.* There is no *overwhelming necessity* for reading this Thurston case out of the Statute. The Thurston case is a claim for a depredation committed by Indians and is manifestly included within the letter and spirit of the Indian Depredation Act.

The case of *Lake Co.* v. *Rollins,* 130 U. S., 662, arose on a writ of error to the Circuit Court of the District of Colorado. The suit in the Court below was based on a large number of county warrants issued for ordinary county expenses, such as witness fees, county charges and the like. The defense set up a constitutional provision limiting the amount of debt which any county should incur and alleged that this amount had been reached prior to the issuance of these warrants, and that the warrants were consequently void. To this defense the plaintiff responded that the provision of the Constitution was not applicable to the warrants in question, as it provided a limit to the debt of a County only for certain special purposes not included in the warrants in suit. The plaintiff then urged that the County had the right to issue warrants in excess of this amount for other purposes.

The lower Court upheld this contention of the plaintiff and awarded a judgment against the County. This de-

cision was reversed on appeal by this Court and on page 670 of the opinion we find the following:

> "We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain, and in such case there is a well settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a Constitutional provision is not ambiguous, the Courts in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.
>
> "To get at the thought or meaning expressed in a Statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted and neither the courts nor the legislature have the right to add to it or take from it. *Newell* v. *People*, 7 N. Y., 9, 97; *Hills* v. *Chicago*, 60 Illinois, 86; *Denn* v. *Reid*, 10 Pet., 524; *Leonard* v. *Wiseman*, 31 Maryland, 201, 204; *People* v. *Potter*, 47 N. Y., 375; *Cooley*, Const. Lim., 57; Story on Const., Sec. 400; *Beardstown* v. *Virginia*, 76 Illinois, 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *United States* v. *Fisher*, 2

Cranch, 358, 399; *Doggett* v. *Florida Railroad*, 99 U. S., 72.

* * * * *

(p. 673) "In the light of these principles, expressed in the authorities quoted and in many others, we must decline to read the expression in section six 'and the aggregate amount of indebtedness of any county, for *all* purposes' etc., as if it were written 'and the aggregate amount of *such* indebtedness' etc. This the defendant in error concedes to be necessary to his case. We see no admissible reason for the introduction of this restrictive word 'such,' except to alter radically the plain meaning of the sentence."

In the present Thurston case, we contend that Congress in framing Section 2 of the Act, meant exactly what they said. The section seems all sufficiently plain. The first resort in this case, as in all cases, is to the natural signification of the words. The natural signification of the words in the present Act includes the Thurston case, and no room is left for the constructive interpolation of the word "Indian" by the Government. In this case of *Lake County* v. *Rollins*, the Court declined to read the expression "for all purposes" as if it were written for "such" purposes. In the present case, the Court has no authority to interpolate the word "Indian" in Section 2 of the Act.

In the case of *Dewey* v. *United States*, 178 U. S., 510, this Court sustained the action of the Court of Claims in fixing the amount of bounty money paid to Admiral Dewey and the officers and men of his fleet in their engagement in Manila Bay. Section 4635 U. S. R. S. provided for a certain bounty in case of the destruction of an enemy's vessel where that vessel was of superior force. In case the enemy's vessel was of inferior force a lower amount of bounty money was granted. It was contended in this case that the batteries and other shore defenses of

Manila Bay should be taken into consideration in determining the strength of the Spanish vessels engaged. The Court of Claims, and this Court in affirming that decision, held that the phrase "enemy's vessel" meant exactly what it expressed and did not include the land batteries. On page 521 the Court held:

> "Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such. Here, the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the Statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress, as thus plainly expressed. *United States* v. *Fisher*, 2 Cranch, 358, 399; *Lake County* v. *Rollins*, 130 U. S., 662, 670."

Likewise in the Thurston case, we ask that this Court take the words of Congress just as they are set forth in the Act. The meaning of these words is clear and unambiguous. The words of this Act should be interpreted according to their natural import. According to the natural import these words include the claim of Malinda Thurston. It is only by the insertion of the word "Indian" through a constructive interpolation that the present claim can be defeated.

In the case of *Marks* v. *The United States*, 161 U. S., 297, the Court had under consideration the term "amity" as used in the Indian Depredation Act. On pages 301-302, the Court held that this word "amity" was a word of common use and as such must be given its ordinary meaning. In the same manner the claimant asks in the

present case that the term "claim pending" be given its ordinary interpretation as applied to a claim pending before Congress.

In the case of *Yerke* v. *United States,* 173 U. S., 439, there was involved a claim depending upon the citizenship of the applicant. This claim arose prior to July 1, 1865, and had been presented to the Interior Department. The case was dismissed by the Court of Claims because the claimant was not a citizen of the United States at the date of the depredation. On page 442 the Court held with reference to the claim:

> "It was on file, and hence may be stated to have been 'pending,' but it was not on behalf of a citizen of the United States. Appellant was not then a citizen. He did not become such until December 16, 1896.
>
> "* * * The Act of 1891 is not ambiguous. Its clearness does not need and may not be construed by analogies from other Statutes or from the practice under other Statutes. The rule is elemental that language which is clear needs no construction. *Lake County* v. *Rollins,* 130 U. S., 662."

In the present case we contend that the claim of Malinda Thurston was on file and hence is included in the term "claim pending," as used in the second section of this Act. The Act is not ambiguous and is not subject to interpretation. The Government cannot be permitted to interpolate the word "Indian" in this clause, when Congress has made no such provision. *Johnson* v. *United States,* 160 U. S., 546, 549.

PROVISO

The wording of a Statute is the most important feature in the determination of its meaning. Of great impor-

tance, and closely associated with the wording, is the grammatical construction. Every clause must be construed in connection with the other clauses of the same sentence. This is of particular importance where the clause to be construed is part of a provisional clause.

The clause of Section 2 now under consideration consists of three parts. An *enacting* clause, a *provisional* clause and a *saving* clause.

The enacting clause provides for the waiving of limitations as to the time and manner of presenting claims. This is a very broad provision, and yet its meaning is still further extended by what immediately follows. No claim shall be excluded from the operation of this section because not filed in a Government Department. We have then, in this section an enacting clause of the widest scope and meaning. (*United States* v. *Martinez,* 195 U. S., 476.) Even the able counsel for the Government must admit that the claim of Malinda Thurston is covered by this clause. If there were no proviso in the section, the claim of Malinda Thurston would come within the strictest letter of the Statute. The claim of Malinda Thurston is one for a depredation committed by Indians, and, as such, is included in the act, unless barred out by the provisional clause.

Let us now look at the proviso. What part of the enacting clause does this proviso affect? *Plainly the proviso relates solely to the part of the enacting clause which provides for the time of filing claims.* In the enacting clause all questions of limitations as to the time of presenting claims are waived. This broad enactment is then limited by the proviso which excepts those claims which arose prior to July 1, 1865, unless they were then pending. The proviso has no reference to the waiver of "all questions of

* * * (the) *manner* of presenting claims," and does not qualify this portion of the enacting clause.

It follows, then, that the proviso in no way limits that part of the enacting clause which waives "all questions of * * * (the) manner of presenting claims." This waiver cannot possibly refer to claims which were to be filed subsequently, as other Sections of the Act provide for the form and manner of presenting the petition to the Court of Claims. (Section 3.) Further, the final clause of this very section prevents the filing of claims for any further depredations. Hence this waiver does not apply to future claims. There is only one conclusion possible.

*The enacting clause that "all questions of * * * (the) manner of presenting claims is hereby waived" applies equally to claims for depredations which occurred before and after July 1, 1865.*

If a depredation occurred prior to July 1, 1865, a claim, with evidence, must have been filed in Congress or a Department of the Government. Otherwise, the Court of Claims has no jurisdiction over it. If, however, a claim was filed with evidence before Congress or a Government Department, it was not necessary for that claim, so filed, to have been presented in any particular manner. All defects in the manner of the filing of claims were waived by the enacting clause.

Why should Congress waive all questions relative to the manner of filing claims which arose subsequent to July 1, 1865, and not include those which arose prior to that date. The Statute covers both classes, and there is no reason or construction which will effect such a discrimination. Congress wished to prevent the filing of stale claims, where no action had been taken. With reference to all claims which had been filed, Congress expressly waived all defects in the manner of filing.

The claim of Malinda Thurston was not presented in a formal manner against the Indians when it was filed in Congress in 1877. All questions of this character are expressly waived, and, consequently, this defect in the original petition filed in Congress is waived.

The rule limiting the effect of a proviso to the clause which it affects is clearly set out in Sedgwick on Interpretation of Statutes, Sec. 186, p. 257.

> "Moreover a proviso is always to be construed with reference to the immediately preceding parts of the clause to which it is attached, and limits only the passage to which it is appended, and not the whole section or Act, or, at least, only the section with which it is incorporated. *Spring* v. *Collector*, 78 Ill., 101. *Lehigh Co.* v. *Meyer*, 102 Pa. St., 479."

Applying this principle to the present case we must limit the effect of the provisional clause to that part of the sentence which immediately precedes it. In this way the provisional clause would limit only the time of the filing of claims before the Secretary of the Interior or other officer or Department of the Government. The provisional clause would have no reference to the first part of the sentence which waived the limitations as to the manner of presenting claims. Under this rule of grammatical construction the provisional clause would have no power upon the *manner* of presenting claims. In other words, the waiving by the Government of all questions relative to the defective manner in which claims had been presented, applies equally to claims filed in the Government Departments and Congress, either prior or subsequent to July 1, 1865.

A clause setting out an exception is a dependent clause. To find out the meaning of the provisional clause and to ascertain what exceptions it covers, it is necessary to look

at the general clause to which it relates and upon which it depends.

In the case of *Minis* vs. *United States*, 15 Pet. 423, 445, the Court, speaking through Mr. Justice Story, held:

> "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

In the present case, the office of this proviso is to qualify that portion of the enacting clause which relates to the time of the filing of claims and to exclude certain cases from its operation. This is the usual and regular office of a proviso and it is so used in the present Act. Compare cases of *American Express Co.* vs. *United States*, 212 U. S. 422, 434; and *Burlingham* vs. *Crouse*, 228 U. S. 459, 471.

In a case which was decided by the Court of Claims under the Navy Personnel Act of March 3, 1899, there was a judgment in favor of the United States. On appeal to this court in the case of *White* v. *United States*, 191 U. S., 545, the judgment of the Court of Claims was upheld. The claimant relied upon a part of the Statute which was incorporated in the proviso. In affirming the decision of the Court of Claims this Court had occasion to deal with the subject of provisos, and held on page 551, as follows:

> "It is undoubtedly true that in Congressional legislation provisos have been included in Statutes which are really independent pieces of legislation, but this is a misuse of the usual purpose and effect of a proviso, which is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation. *Minis* v. *United States*, 15 Pet., 423.

If possible the Act is to be given such construction as will permit both the enacting clause and the proviso to stand and be construed together with a view to carry into effect the whole purpose of the law. 1 Kent, 463. The purview of the act and the words of the proviso must be reconciled if may be, and the operation of the proviso may be limited by the scope of the enacting clause. The object of interpretation being to ascertain the purpose of the lawmakers as expressed in the terms used in the law, we have a right to look to other laws upon the same subject matter, and to consider the purpose intended to be carried into effect by the operation of the new law considered with the old and as a part of a general provision. It is true that if the language used is free from ambiguity it is the best evidence of the thing intended, and, it is the duty of the Courts to find, if possible, within the four corners of the act, and from the language used, the scope and meaning of the law. *Lake County* v. *Rollins*, 130 U. S., 662, 671. It is equally true that it is the business of courts to decide what the law is, and not by consideration or surmises as to the policy of the Government, have the effect to adjudge that to be law which has not been so enacted by the legislature. *Dewey* v. *United States*, 178 U. S., 510, 521. But after all, the main purpose of interpretation is to ascertain and carry into effect the object and purpose of the legislature in making the given law as expressed in the language used."

It is unquestionably true that the proviso in section 2 of the Indian Depredation Act is one which makes an exception to the enacting clause. The enacting clause is general and certain special cases are excepted by the action of the proviso. In accordance with the decision of this Court in the case of *White* v. *United States*, the operation of the proviso is limited by the scope of the enacting clause. The enacting clause of this Act provides for the waiver of questions relating to the *time* and *manner* of filing claims. The

proviso expressly limits the *time* for filing certain special claims. The proviso in no way relates to the *manner* of filing such claims. It is not the business of the Court to go into surmises as to the policy of the Government in enacting a special Statute. Courts are to consider the laws as they stand. If the meaning of Congress can be ascertained from the four corners of an Act the Court is not to go outside of such Act to limit or extend its meaning by such construction.

The general office of the proviso is to restrain generality and to prevent misinterpretation. In the case of *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 36, the Court held:

> "It is true that the office of a proviso, strictly considered, is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation. *Minis* v. *United States,* 15 Pet., 423; *Austin* v. *United States,* 155 U. S., 417, 431; *White* v. *United States,* 191 U. S., 545, 551."

A provisional clause setting out an exception would have no meaning if there were not some general clause upon which it depended. In the present case, we find that the proviso prohibited the filing in the Court of Claims of a claim for a depredation which arose prior to July 1, 1865, and which had not been filed in Government Department or Congress. The general clause upon which this proviso depends must relate to the same subject matter. It would be an absurdity to have a general clause containing matter of a certain nature followed by a dependent relative clause constituting an exception which concerned matter entirely separate from the general clause.

Applying these principles to the construction of this sentence both in its enacting clause and as relates to the proviso, we are forced to the conclusion that the proviso does not

relate to that part of the enacting clause which waives *"all questions of * * * (the) manner of presenting claims."* This is an entirely separate and distinct part of the enacting clause and the dependent proviso is in no way connected with it.

The conclusion is irresistible that the waiver of all questions of the manner of presenting claims by the Government applies equally to claims which arose before and subsequent to July 1, 1865. The claim of Malinda Thurston arose prior to July 1, 1865, and was presented to Congress. The claim of Malinda Thurston was for a depredation committed by Indians in September, 1857. The petition filed in Congress was defective in the manner of charging the Indians with the depredation. The defect in the manner of presenting this claim against the Indians in Congress has been expressly waived by the Government. The Court of Claims erred in finding that they did not have jurisdiction over this claim.

In construing this section of the Indian Depredation Act, it will be helpful to refer to another Statute which is *in pari materia* with the Act. In the case of *Nesbitt* v. *United States*, 186 U. S. 153, the petition filed in the Court of Claims under the Indian Depredation Act alleged that the Sioux Indians had taken the plaintiff's property or on about July 24, 1864. The claim had been filed in the Interior Department before the passage of the Act of March 3, 1891, and was accompanied by the affidavit of the claimant only. The question involved was whether the affidavit of the claimant by itself constituted such evidence as would bring the case within the last clause of the proviso which is now under consideration in the present case. This clause reads "but no case shall be considered pending unless evidence has been presented therein."

In construing the above clause the Court referred to an Act of Congress passed March 29, 1872 (17 Stats. at L.,

190) relative to the filing of Indian depredation claims in the Interior Department. By this Act the Secretary was authorized to prepare rules and regulations "prescribing the *manner* of presenting claims arising under existing laws or treaty stipulations for compensation for depredations committed by Indians, and the degree and character of the *evidence*, necessary to support such claims." In accordance with this Act, the Secretary in 1884 established certain regulations which are set out in full in the opinion of the Court.

These regulations of the Interior Department dealt with the *manner* of presenting claims and with the degree and character of the *evidence* necessary to support such claims. The regulation consisted of two sections. The first section dealt with the *manner* of presenting the claim. There must be a sworn declaration of the claimant, setting out the time and place where the depredation occurred, by what Indians, describing the property stolen or destroyed, etc. The second section of the regulation dealt with the *evidence* necessary to support such claims. The application of claimant must be accompanied by the depositions of two or more persons having personal cognizance of the fact, etc.

By a reference to this earlier Act the Court of Claims, and this Court in affirming the lower Court, held in this *Nesbitt Case* that the word "evidence," as used in the Act of 1891 must be considered as referring to the term "evidence" as used in the prior Act. The "evidence" required by the regulations under the former Act consisted of the depositions of at least two witnesses. The claim was dismissed because the affidavit of the claimant alone did not constitute such evidence as was required by these regulations.

This decision bears very strikingly upon the present claim. The *Nesbitt Case* construed this very portion of the Indian Depredation Act with reference to the "evidence"

required by the rules of the Interior Department under the Act of Congress of 1872. In the Thurston case, we ask that this Court construe the expression "manner of presenting claims" with reference also to the Act of Congress of 1872.

The first section of these regulations passed in 1884 dealt with the *"manner"* of presenting claims before the Interior Department. This section was prepared under authority of the Act of Congress of 1872 which authorized the Secretary of the Interior to prescribe the *"manner"* of presenting these claims. Under this section relating to the *"manner"* of presenting claims, it was necessary for the claimant to designate by what Indians the depredation was committed.

In the present Act Congress has waived "all questions of * * * (the) *manner* of presenting claims." By analogy from the *Nesbitt Case*, we must construe the phrase "manner of presenting claims" by reference to the rules and regulations passed by the Secretary of the Interior under the former Act. Construed in this way, we find that Congress expressly waived these rules with reference to the *manner* of presenting claims. Among the other provisions waived by the Indian Depredation Act is the provision in the regulation of the Secretary of the Interior making it necessary to set out by what Indians the property was taken.

Applying this rule of construction to the present case, we find in the first place, that Congress was in no way bound by any rules or regulations of the Secretary of the Interior. *Leahy* v. *United States*, 41 C. Cls. 266. A claim could be presented to Congress in any form and, if considered by that body, it was properly filed. Even if, however, the claim of Malinda Thurston had been presented under the terms of the rules provided by the Secretary of the Interior, the claim would still fall within the terms of

the Indian Depredation Act, as the defective manner of filing was waived.

This position of the claimant is still further emphasized in the case of the *United States* v. *Martinez*, 195 U. S. 469. This case was filed in the Court of Claims under the Indian Depredation Act and involved the question of the addition of new parties after the expiration of the three year limitation. In other words, the Indian Depredation Act had provided that all claims must be filed within three years after its passage on March 3, 1891. After that date an attempt was made to bring in new parties defendant, namely, a different tribe of Indians than that named in the petition. The Court of Claims decided that this could properly be done. This judgment of the Court of Claims was reversed by this Court. In the course of the opinion of the Court on page 476, it was held:

> "This Act is extremely liberal in permitting presentation of claims for Indian depredations. *All limitations are swept away except the requirement as to the time of filing the petition.* In the present case the depredation is alleged to have been committed eighteen years before the action was commenced. Under these liberal provisions we think it was the purpose of the law to require parties to be duly prosecuted within the three years allowed for the filing of petitions, and the liberality of the Act should not be extended by construction."

This decision has an important bearing upon the present case. In the first place it emphasizes the extreme liberality of Congress in providing for the manner of the presentation of Indian Depredation claims. In the next place it specifically sets out that all limitations upon the filing of claims are swept aside, except the requirement as to the time of filing the petition. This would include the sweeping aside of the limitations upon the *manner* of filing the

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"Interpreting the act (i. e. Indian Depredation Act) as a whole, in the light of past transactions, of existing claims, and of the obligations which have always been asserted by the Government against the Indian tribes, it seems to the Court that while the Statute created no new liability, *it swept away all technical defenses, and consented,* on behalf of both the guardian and the ward, that these Indian depredation cases, so far as may be possible, *should be adjudicated upon their merits.*"

Brown v. *United States,* 32 C. Cls., 432, 439.

provisions were made for the presentation of claims for Indian depredations. *United States* v. *Martinez,* 195 U. S. 476. This general enacting clause is followed by a proviso which excludes from its operation those claims which arose prior to July 1, 1865, and which had not been filed before Congress or a Department of the Government. Congress did not intend to exclude entirely all of those cases which arose prior to July 1, 1865. A great many depredations of this character had occurred and claims for them had been filed in Congress and the Interior Department. To preserve the rights of these diligent claimants, Congress inserted the saving clause.

It is evident from a consideration of this section that the saving clause contains matter closely related to the general enacting clause. The saving clause is not intended as a strict dependent clause upon the proviso. The action of the saving clause in this sentence was intended to keep within the terms of the general enacting clause those cases in which the claimants had been diligent in filing their claims. The enacting clause was extremely liberal in its scope and meaning and, as a part of the enacting clause, and in furtherance

of its liberality, Congress enacted the saving clause to preserve the rights of diligent claimants. In other words, the saving clause is not to be considered as an exception from the action of the provisional clause. The saving clause is to be considered as a part of the general enacting clause and in furtherance of the desire of Congress to be liberal towards pending claims.

This rule of construction relative to the interpretation of the dependent clause is well illustrated in the case of *Ryan* v. *Carter*, 93 U. S., 78. In this case the Court had under consideration a Statute of the United States which confirmed certain land grants made by the Spanish Government in the old province of Louisiana. It was contended that the wording of a proviso in the Act excluded certain claims which had been confirmed by a Board of Commissioners prior to the passage of the Act. This Court overruled this contention and held on page 83:

> "The general rule of the law is, that a proviso carves special exceptions only out of the body of the Act; and those who set up any such exception must establish it, as being within the words as well as the reason thereof. *United States* v. *Dickson*, 15 Pet., 165. * * * If Congress had intended to exclude confirmed claims, the fair presumption is that it would have, in terms, excepted them, or by some form of words declared their exclusion. * * * It would have been wrong, in legislating for the inhabitants of ancient villages, to do anything prejudicial to those who, having been invited to present their claims to the board, had obtained its approval of them. This was recognized by Congress, and, to guard against the possibility of conflict, the proviso was inserted. *No known rule of law requires us to interpret it according to its literal import, when its evident intent is different.*"

In this case it was contended that a strict interpretation of the wording of the provisional clause would exclude these confirmed claims. This Court held, however, that the Act should be construed in accordance with the evident intent of Congress. In like manner in this Thurston case, we contend that this saving clause should be construed in accordance with the evident intent of Congress to deal liberally in the manner of the presentation of claims.

There is no word in the Act which would suggest that Congress intended to deal liberally with those claims which arose subsequent to July 1, 1865, and not to deal liberally with those claims which arose prior to July 1, 1865. There is no reason for any such distinction. The evident intent of Congress as gathered from the entire Act was an *extreme liberality* in the manner of presenting claims. There is nothing in the Act which would limit this liberality to those claims which arose subsequent to July 1, 1865.

Considering then, this saving clause as within the scope and meaning of the general enacting clause and in furtherance of its liberality in the presentation of claims, we must consider the general rule of law which relates to the interpretation of the proviso. A provisional clause, connected with a general enacting clause, is to be construed strictly and no case is to be excluded from the terms of an enacting clause which does not fall fairly within the express terms of the proviso.

In the case of *United States* v. *Dickson*, 15 Pet. 141, this Court had under consideration the construction of an Act of Congress, in which there was a general enacting clause followed by a proviso. On page 165 of the opinion it was held:

> "Passing from these considerations to another, which necessarily brings under review the second point of objection to the charge of the court below,

> we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short a proviso carves special exceptions only out of the enacting clause and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."

Applying these principles to the Thurston case, we have a general enacting clause and a saving clause which are extremely liberal in permitting claims to be filed. Attached to these clauses there is a dependent relative clause, constituting a proviso, which limits the operation of the Statute in regard to those cases which arose prior to July 1, 1865. It will be conceded by the Government that the claim of Malinda Thurston is included in the general enacting clause and can only be excluded by the action of the proviso. Following out the rule of interpretation as laid down in this *Dickson Case* the burden of establishing the fact that the claim of Malinda Thurston falls within the purview of the proviso is upon the Government. Unless this case falls clearly within the terms of the proviso it is to be considered as falling within the terms of the general enacting and saving clauses. *Schlemmer* v. *Buffalo, etc., Railroad*, 205 U. S. 1, 10.

This rule of law with reference to the action of the proviso is well set out in the case of *Javierre* v. *Central Altagracia*, 217 U. S. 502. The Court states on page 507:

> "As to the burden of proof, if that really in any way determined the result, the ruling was correct. The appellants were seeking to escape from the contract made by them on the ground of a condition

> subsequent embodied in a proviso. It was for them to show that the facts of the condition had come to pass. * * * So there is nothing but the general question to be considered and that is answered by the statement of it and by repeated decisions of this Court. When a proviso like this carves an exception out of the body of a Statute or contract those who set up such exception must prove it."

In the present case the Government is attempting to defeat the claim of Malinda Thurston by alleging that it falls within the terms of this proviso. They are seeking to escape from the operation of the Statute by this means. The burden is upon the Government to show that the case of Malinda Thurston falls within the terms of this proviso. A reading of the enacting clause in connection with the saving clause shows that the claim of Malinda Thurston was properly filed in Congress within the meaning of the law and that all questions relating to the manner of its filing were waived by the Government.

If Congress had intended to exclude from this Statute a claim for an Indian depredation because such claim had been defectively filed against the Indians, the fair presumption is that Congress would have in terms excepted such claim. Congress did not except such claims from the Act. The term "claim pending," as found in the saving clause, fairly includes the claim of Malinda Thurston. The claim of Malinda Thurston was defectively filed against the Indians. This defective manner of filing this claim was expressly waived by Congress.

In the determination of claims for Indian depredations filed in the Interior Department, it was not necessary that notice be given to the Indians. *Jaeger* v. *United States*, 27 C. Cls., 278, 287. The Court said in this case that under the terms of the Indian Depredation Act, the Government placed itself in the legal position of being re-

sponsible for the torts of the Indians. Under this decision it was plainly unnecessary to name the Indians as defendants to a suit filed in the Interior Department.

The claim of Malinda Thurston was not filed in the Interior Department but was filed in Congress. There are no technical rules of pleading applicable to bills introduced in Congress. It is sufficient for a claim to be pending before Congress, if such claim is filed and considered by that body. Hence it was not necessary in Congress to name Indians as defendants.

In the case of *Leahy*, 41 C. Cls., 266, involving the construction of the Tucker Act (24 Stats. at L., 507) the Court of Claims construed section 12 which provided "that when any *claim* or matter may be *pending* in any of the Executive Departments," etc. It will be noted that the term "claim pending" here considered, is an identical expression with the language used by Congress in the Indian Depredation Act. It was contended that the *Leahy Case* as filed in Congress, did not involve such subject matter as to constitute a pending claim against the United States. It was held, however, on page 267:

> "The Court will not undertake to prescribe for Congress a rule of pleading, or any particular form of language requisite for them to use in bills they may see fit to refer to the Court."

In the present case the claim of Malinda Thurston was pending in Congress at the time of the passage of the Indian Depredation Act. It was a claim for a depredation committed by Indians and as such constituted a "claim pending" within the meaning of that Act.

The Court will not undertake to prescribe for Congress any technical rules for pleading. The manner in which the claim of Malinda Thurston was filed against the In-

dians in Congress may have been defective, but Congress has expressly waived all questions relative to this defective manner of filing.

For a further construction of the term "claim pending" as used in the Tucker and Bowman Acts, see cases of *Cahalan*, 42 C. Cls., 281, and of *Cofer*, 30 C. Cls., 131, 134.

To summarize our position relative to the construction of this section of the Indian Depredation Act. The words of the enacting and saving clauses in Section 2 are general and include the claim of Mrs. Malinda Thurston. The contention of the Government that this claim falls within the proviso requires the interpolation of additional words in the Statute. The meaning of the Statute is plain and this interpolation cannot be made.

The office of the proviso is to except special cases from the general enacting clause. The proviso under consideration has no relation to the first part of that clause whereby Congress waived all questions relative to the *manner* of filing the claims. The claim of Malinda Thurston as filed in Congress in 1877 was defective in the manner of charging the Indians. This defect was expressly waived by Congress.

It is a well settled principle of statutory construction that a proviso which excludes specific cases from a general clause is to be construed strictly. No case which does not fall fairly within the terms of the proviso is to be included. The burden of establishing that a particular case falls within the terms of a proviso is upon the party setting up such fact. The burden is upon the Government to show by the words of this Statute that the claim of Malinda Thurston falls fairly within the terms of the proviso and is not covered by the general enacting and saving clauses of the Statute.

The claim of Malinda Thurston is for a depredation committed by Indians. The claim was filed in Congress in 1877 but was defective in the manner of charging the Indians. Congress has waived the right to insist upon this defect in the manner of charging these Indians. The Court of Claims erred in holding that it did not have jurisdiction of this claim, and in not awarding judgment for the claimant in the sum of $9,500.

PURPOSE OF THE LAW

Rules of construction are framed to enable Courts to determine the intent of the law makers in passing a particular act. Where the meaning of the law is plain as set out in its words, no interpretation is possible. Apart from the wording of an act and in explanation of its terms, the Court will look to the purpose of the law to discover the intent of Congress.

THE PURPOSE OF SECTION 2 OF THE INDIAN DEPREDATION ACT WAS TO PROTECT DILIGENT CLAIMANTS AND TO PREVENT THE FILING OF STALE CLAIMS.

At the time of the passage of the Indian Depredation Act on March 3, 1891, a large number of claims arising out of Indian depredations had been filed in Congress and in the Interor Department. Numbers of these claims had been appropriated for and paid by Congress. Congress wished to refer the remaining claims to some judicial tribunal which would weed out the just claims from those which had no merit. In enacting Section 2 of the Act, Congress meant to place a limitation upon the filing of claims. All claims for depredations which occurred subsequent to July 1, 1865, should be filed in the Court of Claims. Those claims which arose prior to July 1, 1865, could not be filed in the Court of Claims, unless the claimant had filed his application before the Interior Depart-

ment or Congress prior to the passage of the Act. It is very plain from a reading of the Act that Congress intended to cut out from the operation of this Statute all those cases in which the claimant had not been diligent.

It was not the purpose of Congress to set up technical rules of pleading as a bar to a diligent claimant. If a claimant had been diligent in filing a claim, it was not necessary that the claim should have been technically and legally accurate. All questions of the manner of filing claims were waived. The law was extremely liberal in protecting diligent claimants.

The Court of Claims has considered this provision of the Indian Depredation Act on several occasions. In the case of *Weston* v. *United States,* 29 C. Cls., 420, the Court considered the effect of this section of the Act. It was contended that the claim had been properly filed before the Interior Department, but no evidence had been submitted in support of the claim. The Court dismissed the petition but in commenting upon Section 2 of the Act they held on page 424:

> *"It was evidently the intention of Congress to protect those who had incurred the expense of taking testimony and collecting evidence and presenting the same to the Department* and to exclude those who had made application for payment and thereafter had taken no steps for the prosecution of their claims, and especially to exclude those who, while the bill was pending before Congress, hastened to make application for payment of claims which had been neglected for so many years as to labor under the presumption, or suspicion at least, of being visionary or stale."

The case of Malinda Thurston comes directly within this decision of the Court. This claimant had been diligent in collecting evidence and had presented the same to

Congress as early as 1877. When the Indian Depredation Act was passed she presented her claim in due form to the Court of Claims. It cannot be said that her claim was visionary or stale. The claim of Malinda Thurston was pending within the meaning of the law.

The Indian Depredation Act was construed by the Court of Claims in the case of *Stevens* v. *United States,* 34 C. Cls., 244. The Court held:

> "The purpose of the statute undoubtedly is that claims which accrued before 1865 should have been presented, *and to a certain extent authenticated,* before the Act of 1891 became a law, or that they should not be brought into this Court in the form of actions at law. In other words, the benefits of the statute do not extend to a claim which occurred prior to 1865, unless it had been presented before the passage of the Act and had been accompanied by evidence more or less to sustain it. *The statute is silent as to the manner of presentation and as to the form of the evidence.* Undoubtedly a claim presented to Congress must be presented in writing for there is no other way of presenting a claim to Congress than by petition or the introduction of a bill. A claim, too, could hardly be considered as 'pending' before the Secretary of the Interior unless it had been presented to him in a written form."

In the *Stevens Case* there was no record of the filing of the claim in the Indian Office. The claimant introduced evidence to show that he had presented the claim to the Indian Agent. The Court thereupon held that there was no provision in the Statute limiting the *manner of presentation* or the *form of the evidence* accompanying the claim and awarded judgment to the claimant.

In the present case the claim of Malinda Thurston was duly filed in Congress in 1877. The manner of the pres-

entation of this claim to Congress was defective as against the Indians. The Indian Depredation Act is silent as to the manner of presentation to Congress. All technicalities relative to such presentation are expressly waived by the Act. The claim of Malinda Thurston was duly filed within the meaning of the law.

In the case of *Martin* v. *United States*, 46 C. Cls., 200, the Court of Claims had under consideration an Indian depredation case in which there had been filed in the Interior Department a claim for certain property. After the passage of the Indian Depredation Act the claimant filed his petition in the Court of Claims and alleged the loss of property different from that described in his claim filed in the Interior Department. The Court decided that the variance between these two claims was fatal and dismissed the petition. They held that it was necessary for the Court to have jurisdiction over the subject matter of the claim as well as over the person of the claimant. In considering this section of the Indian Depredation Act, the Court stated at page 203:

> "The proviso to Section 2 of the Act of March 3, 1891, excluding claims arising prior to July 1, 1865, unless previously filed in the Interior Department, was evidently designed to forestall recovery in that particular class of claims quite ancient in their origin, *wherein the claimant was not sufficiently interested to preserve contemporaneous evidence of the event and diligently pursue his remedy before the department and Congress.* The Court has uniformly considered the filing of claims before the departments and Congress, whether within or without the statutory period, as a favorable circumstance in behalf of claimants."

In the present case, Malinda Thurston filed her claim in Congress in 1877 and accompanied the petition by evi-

dence in support of it. This claim was not stale. The application to Congress was defective in the manner of charging the defendant Indians. This defect was expressly waived by Congress.

It will thus be seen that Malinda Thurston has been diligent in pursuing her remedy before Congress and in the Court of Claims. An application for payment was filed in Congress in 1877 and 1878. The petition in the Court of Claims was filed in 1891. In 1896 the claimant's attorney, A. R. Bogue, of Stockton, California, wrote to the Court of Claims about the case. Under date of March 16, 1896, the Clerk of the Court of Claims answered that the claim of Malinda Thurston had not been filed in that Court. This was an error, but it served to prevent the claimant from taking further steps in the matter until recently when the present evidence was taken and the case briefed and presented to the Court of Claims.

The purpose of Section 2 of the Indian Depredation Act was to protect diligent claimants. There was no purpose on the part of Congress to throw undue technicalities in the way of a just claim. If the claimant had been diligent in filing his claim before the Interior Department or before Congress and had introduced evidence in support of it, he was not to be barred on account of any technicalities.

The claim of Malinda Thurston falls plainly within the wording of the Act. Any defect in the manner of presenting her claim to Congress was expressly waived. She was diligent in prosecuting her remedy and her claim falls within the evident intent and purpose of the law, which was to protect a diligent claimant. The purpose of Section 2 of the Act was to prevent the filing of stale claims. The claim of Malinda Thurston was not a stale claim and the

Court of Claims erred in refusing to take jurisdiction over her case and award her a judgment.

OFFICIAL NOTICE OF CLAIM

It cannot be contended by the Government that they were in any way prejudiced by the defective manner in which this claim was filed before Congress. The object of giving notice to a defendant is to put him on inquiry so that he may ascertain in due time all the facts relative to the claim. In the present case the claim of Malinda Thurston was filed in Congress in 1877 and 1878 and was accompanied by affidavits which set out fully the facts of the loss. In each of the bills introduced in Congress it was set out that the loss had occurred near what was known as Mountain Meadows, Utah. In the affidavits accompanying these bills, the details of the loss are very elaborately stated. (Finding VII, pages 5-13.)

The massacre which occurred at Mountain Meadows was a public event of great and horrible interest and was of general notoriety throughout the length and breadth of the land. Numerous official investigations and reports to Congress were made by the Indian Office and War Department as early as 1858 and 1859. In all of these reports it officially appeared that the Indians committed the massacre under the leadership of the Mormons.

In Finding IV, the Court of Claims has set out these facts and has also set out that Congress itself had official notice of this massacre through its reports and through debates in Congress. Not only did Congress have special notice of the facts of this massacre, but the matter was of such prominence that it has become a part of the history of our country. The Courts, and Congress as well, will take judicial notice of a matter of history. *Bank of Augusta* v. *Earle*, 13 Pet., 519, 590; *United States* v. *Union*

Pacific R. R., 91 U. S. 72, 79; 1 Greenleaf's Evidence (15th Ed.) Section 5.

This rule relative to judicial notice has been well stated in the case of *Swinnerton* v. *Columbia Insurance Co.*, 37 N. Y., 174, as follows:

> "The rule I take it to be this: That matters of public history, affecting the whole people, are judicially taken notice of by the courts; that no evidence need be produced to establish them; that the Court (may), in ascertaining them resort to such documents of reference as may be at hand, and as may be worthy of confidence. * * * Knowledge of the main fact would necessarily carry with it knowledge of the particular acts of war which create that condition of things."

Bancroft's History of Utah, Volume 26, devotes Chapter 20 (page 545, et seq.) to the account of this massacre. In Dunn's "Massacres of the Mountains," page 273, Chapter X, there is also set out a full report of the details.

The official reports to Congress and the historical nature of the event must be considered as part of the case. When the claim of Malinda Thurston was introduced in Congress that body had official and judicial notice of the fact that the massacre at Mountain Meadows had been committed by Indians as well as Mormons. It cannot be said that the Government was misled by the fact that the claim was filed against the Mormons and not against the Indians. The details of the massacre, the time and place when it occurred, etc., were fully set out in the bills and affidavits introduced in Congress.

The claim of Malinda Thurston falls within the strictest interpretation of the Statute. It is not a stale claim. Congress had full notice of the claim when it was filed in 1877 and knew at that time that it was a claim for a depredation committed by Indians.

CONCLUSION

In conclusion, the appellant would urge upon the Court the equity of the claimant in the present case. Malinda Thurston has diligently prosecuted her claim before Congress and in the Court of Claims. The petitions which she filed in Congress in 1877 and 1878 set out fully that the loss occurred at the Mountain Meadows massacre. This petition was accompanied by the evidence of several witnesses who supported the details of the loss by their testimony. The claim has not been allowed to lapse, and falls within the purpose of the Indian Depredation Act to protect diligent claimants.

Every presumption is to be given by the Court in favor of that construction of the law which will permit Malinda Thurston to recover. The proviso under which the Government has acted is to be construed strictly and no claim is to be thrown out of Court unless it is fully covered by the proviso.

A recovery can be denied in this case only upon highly technical grounds. The equities of the case are all in favor of the claimant. The claim of Malinda Thurston is an Indian depredation claim and falls within the terms of the Statute. The claimant lost her property as set out in the petition and the Court of Claims has found this fact from the evidence. It is only by a forced and strained construction of the Act that the Government can exclude this claim.

The claimant's father, William Cameron, and his family were massacred at Mountain Meadows by the Indians and Mormons. The Indians and Mormons took the property of the claimant. The claimant presented her petition for relief with evidence to Congress in 1877 and 1878. The claimant duly filed her case in the Court of Claims under the Indian Depredation Act. The wording of the Indian

Depredation Act is extremely liberal in providing for the manner of the presentation of claims. There was a defective filing of this claim against the Indians in Congress. This defect was expressly waived by the Act.

The Government insists upon a technical construction of the Act which would exclude the case of the claimant. In spite of the fact that the Statute expressly waived all questions relative to the manner of filing claims, the Government contends that technically the claim was never filed.

It is respectfully urged by the claimant that a construction of this Statute in accordance with the contention of the Government would be in violation of that liberality which characterizes the Act.

An examination of the findings of fact discloses to the Court that they are full and adequate and protect every substantial right of the Government. Under the authority of the case of *Green County* v. *Thomas' Executor,* 211 U. S., 598, Counsel for the Appellant respectfully request that the judgment of the Court of Claims be reversed and that a judgment be entered in favor of the claimant for the sum of $9,500.

Respectfully submitted,

F. SPRIGG PERRY,
HARRY PEYTON,
Attorneys for Claimant.

J. W. CLARK,
Attorney of Record.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

MALINDA THURSTON, ADMINISTRATRIX OF the Estate of William Cameron, Deceased, Appellant,
v.
THE UNITED STATES AND THE UTE INDIANS.

No. 605.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

Appellant brought an action in the Court of Claims under the Indian Depredation Act, entitled *"An Act to provide for the adjudication and payment of claims arising from Indian depredations,"* approved March 3, 1891 (26 Stat. L., 851), being in part as follows:

> First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, with-

out just cause or provocation on the part of the owner or agent in charge, and not returned or paid for. * * *

SECTION 2. That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government: *Provided,* That no claim accruing prior to July 1, 1865, shall be considered by the court unless the claim shall be allowed or has been or is pending, prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States, * * *

The depredation in question occurred at the Mountain Meadows massacre in Utah in September, 1857. It is alleged, and the court below found, that one of the persons massacred was William Cameron. (R., p. 3.)

His daughter, Malinda Thurston, being the next of kin living, brought this action as administratrix of his estate.

On November 12, 1877, and March 18, 1878, respectively, there were introduced in the House of Representatives bills for the relief of Malinda Thurston and Nancy Littleton, her sister, and others (Rec., pp. 5 and 6), as surviving children of William and Martha Cameron, charging that his property was "*taken possession of by the Mormons.*"

Accompanying each of these bills was the petition of Mrs. Martha Thurston and the affidavits of three persons supporting the averments therein.

It was alleged in each petition and in the affidavits that William and Martha Cameron "*were murdered and robbed by the Mormons.*"

There was nothing in either bill introduced in the House of Representatives, or in the said petitions or affidavits, *naming Indians or charging Indians with having committed the depredation.*

In 1891 the Indian depredation act heretofore referred to was passed.

When appellant invoked the jurisdiction of the Court of Claims under this act, in the year 1892, *allegation was made for the first time* (Rec., p. 1) that "a band or party of Indians belonging to a band, tribe, or nation known as Ute Indians, then in amity with the United States, did * * * take, steal, and carry away or destroy the following articles of property belonging to said William Cameron," etc.

Then averring regarding the bills introduced in the House of Representatives, she alleged (Rec., p. 2, par. 6) "*that in both the above bills the depredation is alleged to have been committed by Mormons alone; that said allegation has been proven a mistake by historical evidence and that the depredation was committed by Mormons and Indians also.*"

The Court of Claims found in substance that the claim was for property—

(*a*) Valued at $9,500 and taken by the Mormons and Indians in September, 1857;

(*b*) That the claim was filed with Congress in November, 1877, and March, 1878, respectively, and was against the Mormons only;

(*c*) That the claim filed in the Court of Claims was against Mormons and Indians;

(*d*) That no claim having been filed in Congress against Indians prior to March 3, 1891, and this claim having accrued prior to July 1, 1865, the court was without jurisdiction to consider the same.

II.

ARGUMENT.

APPELLANT'S CONTENTION.

We understand appellant's contention to be in substance as follows:

(*a*) That her claim was pending before Congress prior to the passage of the Indian depredation act, notwithstanding Mormons and not Indians were charged with the depredation.

(*b*) That the Indian depredation act did not require that the claim filed before Congress should name Indians.

(*c*) That the following words in the *proviso* of section 2 of the act, i. e., a "claim * * * pending," mean in their connection with the rest of the

act that if any claim, regardless of the depredators named therein, was pending before Congress prior to March 3, 1891, and it subsequently appeared that Indians were the depredators, then the person making the claim had complied with the condition of the *proviso,* and the Court of Claims could take jurisdiction.

APPELLEE'S CONTENTION.

Appellee contends:

First. That the act of March 3, 1891, must be strictly construed.

Second. That the Indian depredation act required that a claim which accrued previous to July 1, 1865, must, as presented to Congress, *have charged Indians with having committed the depredation.*

Third. That the *proviso* of said act is one of limitation, and in order that the Court of Claims might have jurisdiction a claim which accrued prior to July 1, 1865, must have been filed in Congress prior to March 3, 1891.

Fourth. That appellant's petition before Congress, having prayed for a gratuity, did not allege a claim.

Fifth. That the court, having found from the evidence that both the Indians and Mormons confiscated the property, could not have entered any other judgment than that of dismissal of the petition.

FIRST.

The act of March 3, 1891, must be strictly construed.

The statute of March 3, 1891, being in derogation of common law and giving "a right of action for an injury not previously actionable" must be strictly construed against the petitioner.

This court in the case of *Price* v. *The United States et al.* (174 U. S., 373), construing this act, said:

> The jurisdiction of the Court of Claims cannot be enlarged by implication. It matters not what may seem to this court equitable, or what obligations we may deem ought to be assumed by the Government, or the Indian tribe whose members were guilty of this depredation, we can not go beyond the language of the statute and impose a liability which the Government has not declared its willingness to asume. It is useless to cite all the authorities, for they are many, upon the proposition. It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability in suit can not be extended beyond the plain language of the statute authorizing it. See, among other cases, *Schillinger* v. *United States* (155 U. S., 163, 166), in which this court said:
>
> "The United States can not be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the court for judi-

> cial determination. Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liability of the Government."

The Court of Claims, in the case of *Wilson et al.* v. *The United States et al.* (38 C. Cls., 6), declared, in the following words, that this act must be strictly construed:

> The Indian depredation act, March 3, 1891, must be strictly construed. Redress under it is limited to the statutory description of the obligation which the Government has assumed. Jurisdiction can not be extended to equitable claims.
>
> *Johnson* v. *The United States et al.* (160 U. S., 546);
>
> *Wisconsin Central R. R. Co.* v. *The United States* (164 U. S., 190, 202).

SECOND.

The Indian depredation act required that a claim which accrued previous to July 1, 1865, must, as presented to Congress, have charged Indians with having committed the depredation.

An inspection of the petitions of Malinda Thurston, together with the supporting affidavits and the bills introduced in Congress, shows that all charged *Mormons* with having committed the depredation. Nowhere are Indians mentioned. We contend that the claim in this case having arisen

previous to July 1, 1865, as presented to Congress must have named and charged Indians with having committed the depredation, and the bills introduced must also have charged Indians. Otherwise, we say that this claim was not "pending" prior to the passage of the Indian depredation act of 1891.

The title of the act under consideration refers to "*claims arising from Indian depredations.*"

The *first* section of the act, in describing the claims considered, limits them to—

"All claims for property * * * *taken or destroyed by Indians.*"

The second section must be read conjointly with the first.

In the case of *Marks* v. *The United States et al.* (161 U. S., 297, 306), in speaking of section 2 of this act, this court declared in the following language that it should be considered with the first section:

> Full scope can be given for the operation of these words in section 2 (i. e., no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government) by connecting them with the first jurisdictional clause, which is the general grant of jurisdiction over all claims for property of citizens taken or destroyed by Indians in amity with the United States.

It follows, then, that wherever the word "claim" is used in the act after the first paragraph, that it must be understood that the words *"for property destroyed by Indians"* are affixed to the same. Having once defined and limited the character and kind of claims in the *title* and *first section*, it was unnecessary and would have been redundancy to repeat the qualifying words every time the word "claim" was used in the act.

The word "claim" being thus qualified and described, made it incumbent upon appellant in presenting her claim to Congress to charge Indians with the depredation. The *proviso* declared—

> That *no claim accruing prior to July 1, 1865*, shall be considered by the court unless the claim shall be allowed or has been or is pending, prior to the passage of this act, before the Secretary of the Interior or the Congress of the United States. * * * (Italics ours.)

We understand, however, that appellant argues that the words "*claim* * * * *pending*" simply refer to time, and that if a claimant had filed a petition in Congress, it made no difference who was charged in the petition, affidavits, or bills. In other words, appellant construes this *proviso* to mean that so long as a claim was filed previous to 1891 it might be disguised under any kind of a description whatsoever, provided it ultimately turned out that Indians committed the depredation.

Following appellant's contention to its last analysis, claims which were described as war claims, under the captured and abandoned property act, or claims against Mexico or Great Britain, could, if filed prior to March 3, 1891, have been made the basis of an action in the Court of Claims, under the Indian depredation act, if it ultimately turned out that they were claims for property destroyed by Indians. Appellant (Brief, p. 15), quotes from the case of *Johnson* v. *The United States et al.* (160 U. S., 546, 549). We suggest that in the foregoing case this court has construed, not the second paragraph of the Indian depredation act, but rather the first paragraph, and the opinion supports the contention made under our second point, namely, that Indians must have been specifically charged in the petitions presented to Congress.

Appellant further argues that the failure to charge Indians in her petitions presented to Congress was an immaterial defect in the *manner* of presenting the claim, i. e., the defect was one of informality rather than one lacking in the very essence, and that the charging of Mormons instead of Indians did not exclude it from the operation of the statute of 1891.

Appellant quotes (Brief, p. 54) from the case of *Stevens* v. *The United States et al.* (34 C. Cls., 244).

The view of the Court of Claims could have been clearly presented to this court by a more complete quotation. From its language the court undoubt-

edly understood that the waiver of limitation, as set forth in the first two lines of section 2, referred to the method or means employed in presenting claims.

For example, Congress simply intended that a claim might have been presented by an attorney or personally, sworn to or unsworn to. This would not, however, entitle this appellant to declare in the first instance that the Mormons were guilty of the depredation and liable, and then many years later, when this act was passed, come into court and say, in substance: We were mistaken when we said in our congressional petition that the destruction was committed by Mormons. We should have said it was committed by Indians, and we now ask the court to find that when we swore it was Mormons who committed the depredation we were mistaken and we should have also said Indians.

THIRD.

The proviso of said act is one of limitation, and in order that the Court of Claims might have jurisdiction, a claim which accrued prior to July 1, 1865, must have been filed in Congress prior to March 3, 1891.

Appellant contends that the first clause of section 2 waives all question of limitation in presenting this claim to Congress.

The first part of section 2 is as follows:

> SEC. 2. That all questions of limitation as to time and manner of presenting claims are hereby waived, and no claim shall be

> excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or the Congress of the United States or other officer or department of the Government.

We submit that this clause, read in connection with the first section of the act describing the claims arising from property destroyed by Indians, and read also with the subsequent *proviso* of section 2, simply means and declares that *claims arising after July 1, 1865,* shall not be subject to any limitation as to time or informality of presentation before various and sundry officers of the Government. It does not mean, however, that the claims accruing *previous to July 1, 1865,* shall likewise have no limitation as to time of filing before Congress, for if it did, why did Congress say in the *proviso,* that no "claim accruing prior to July 1, 1865, shall be considered by the court unless the claim * * * has been or is pending prior to the passage of this act (Act of 1891) before * * * the Congress of the United States, * * *"

To sum up at this point, we say that if (*a*) the claim in question arose before July 1, 1865, and (*b*) in Congress charged Mormons, and not Indians, with the depredation, and (*c*) the Indian depredation act of 1891 limited claims to Indian depredations only, and (*d*) the *proviso* in section 2 of the act required claims for Indian depredations accruing prior to July 1, 1865, to have been filed previous to March 3, 1891, then the claim in question, hav-

ing arisen prior to July 1, 1865, and having been presented to Congress as a claim against the Mormons, falls because the parties described in the statute were not named as the depredators, and therefore there was no " claim pending " prior to 1891, as contemplated by the statute.

FOURTH.

Appellant's petition before Congress, having prayed for a gratuity, did not allege a claim.

Appellant has proceeded throughout this case on the theory that she actually had a claim pending before Congress when she filed her petitions and affidavits and initiated the two bills before the House.

This court has held in the case of *Prigg* v. *Pennsylvania* (16 Pet., 539–615), and in other cases, that a claim is " *a demand of some matter as of right* * * *." Appellant, however, has never had a claim filed in Congress " demanding some matter as of right." The right to indemnification made for property taken and destroyed by Indians as provided in the act of June 30, 1834 (4 Stat. L., 731), had been repealed (12 Stat. L., 120), before appellant's bills were initiated and there was, therefore, no liability which the United States could recognize.

It is obvious that appellant had no claim against the Mormons for which the United States would be liable. At the same time the petitions and the

affidavits filed therein, having failed to name Indians, would lead to the irresistible conclusion that she had abandoned what claim, if any, she had against them. Therefore, we contend that appellant's asserted "claim pending" was not a claim, but merely an appeal to the generosity of Congress, and did not come within the meaning of the proviso of section 2 of the Indian Depredation Act.

FIFTH.

The court, having found from the evidence that both Indians and Mormons confiscated the property, could not have entered any other judgment than that of dismissal of the petition.

Appellant makes no objection to that part of the finding of the court (R., p. 4), wherein it holds that—

> The property of the emigrants was confiscated by Mormons and Indians.

If we are concluded by the findings of the court, then must it not be presumed that the court could not distinguish the liability of the Indians from the Mormons so as to charge the Indians with specific liability? Otherwise, it would have fixed the liability.

We, therefore, suggest that there having been no objection made on part of appellant to the court's failure to fix the liability upon any one, and the findings having stated that both Mormons and Indians confiscated the property, the court could not have specifically charged the Indians with any fixed amount from the evidence introduced.

If this position is tenable, then we submit that the court was foreclosed from entering any other judgment than the one of dismissal of the petition.

III.

CONCLUSION.

We respectfully submit, therefore, by way of conclusion, that the Indian Depredation Act of March 3, 1891, must be strictly construed against the appellant, and—

That appellant having failed to charge Indians with the depredation in question prior to March 3, 1891, the limitation of the proviso in section 2 has run, and the Court of Claims is without jurisdiction to consider the claim.

HUSTON THOMPSON,
Assistant Attorney General.

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